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No. 868

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, and AUTO CONVOY CO.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORTS, INC.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORTS, INC.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

JURISDICTIONAL STATEMENT.

This appeal is from judgments entered in the United States District Court, Western District of Oklahoma, on September 9, 1965, in two causes consolidated by orders of that Court on October 5, 1965, in which judgments the Court declared valid orders of the Interstate Commerce Commission issued in its Docket No. MC-43038 (Sub-No. 404), Commercial Carriers, Inc.—Petition for Modification of Existing Certificates, and its Docket No. MC-30837 (Sub-No. 185), Kenosha Auto Transports, Inc. Petition for Modification of Existing Certificates.

Upon entry of these judgments, the Court, *sua sponte*, continued in effect for 30 days an order restraining the effectiveness of the orders of the Interstate Commerce Commission, and, upon application, on September 30, 1965, continued the restraining order in effect until the final determination of this appeal.

OPINIONS BELOW.

The opinions of the District Court are reported at 245 Fed. Supp. 561 and 245 Fed. Supp. 571 (on which page in the published advance sheet there is an obvious omission following the first sentence of the majority opinion).

Copies of these opinions are appended hereto (with the omission supplied), numbered A-1 and A-2.

The determinative orders of the Interstate Commerce Commission are an order dated March 25, 1965, service date March 31, 1965, entered in Docket No. MC-43038 (Sub-No. 404), hereto appended as A-3, and an order of March 25, 1965, service date April 1, 1965, entered in Docket No. MC-30837 (Sub-No. 185), appended hereto as A-4.

JURISDICTION.

In the District Court, the suits, largely identical in nature, were brought pursuant to 28 U. S. C., Sections 1336, 1338, 2321, et seq., and 5 U. S. C., Section 1001, et seq., to set aside orders of the Interstate Commerce Commission.

Judgments appealed from were entered September 9, 1965. Notice of Appeal was filed November 5, 1965, in the United States District Court, Western District of Oklahoma, on behalf of all appellants below.

Statutory review by this Court on direct appeal as provided by 28 U. S. C. 1253 and 2101 (d), supported by the decisions of this Court in **United States v. Capital Transit Company**, 325 U. S. 357, and **U. S. v. Pierce Auto Freight Lines, Inc.**, 327 U. S. 515; **American Trucking Associations, Inc. et al. v. U. S.**, 364 U. S. 1.

STATUTES INVOLVED.

Section 7, Administrative Procedure Act (5 U. S. C., Section 1006) (c):

> "Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

Section 8, Administrative Procedure Act (5 U. S. C., Section 1007) (b):

> "Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon

agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Section 10, Administrative Procedure Act (5 U. S. C., Section 1009) (e):

"Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance or procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or

otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTIONS PRESENTED.

1. Did the failure of the Interstate Commerce Commission to state the reasons and basis for its orders and to make findings of fact in support of its conclusions and decision violate the requirements of the Administrative Procedure Act, 5 U. S. C. 1001, *et seq.*?

2. Did the refusal of the Interstate Commerce Commission to grant a hearing with the right of cross-examination and the right to present proffered evidence in opposition, demanded by appellants, violate the requirements of the Administrative Procedure Act, 5 U. S. C. 100, *et seq.*, and amount to a denial of due process required by Amendment V, U. S. Constitution?

3. Did the failure of the Interstate Commerce Commission effectively prevent the required inquiry into the evidence needed to support an application for authority required by the Interstate Commerce Act, 49 U. S. C. 307A?

Although the application cases before the Interstate Commerce Commission (Commission herein) followed similar lines to the same conclusion, some procedural differences occurred. Therefore, the background is separately stated in chronological order in each instance.

The "Commercial" Case.

Commercial Carriers, Inc. (Commercial herein) filed its application on July 17, 1963. United Transports, Inc. (United herein) submitted its reply on September 30, 1963, to which Commercial filed a response on October 27, 1963.

On March 3, 1964, the Commission ordered a denial of the Commercial application.

Commercial filed, on April 20, 1964, a petition for reconsideration to which petition United filed a reply on May 1, 1964.

On December 17, 1964, the Commission entered an order whereby its prior decision was reconsidered, reversed, and the application of Commercial was granted.

The "Kenosha" Case.

Kenosha Auto Transport Corporation (Kenosha herein) filed its application on December 3, 1963.

Auto Convoy Company filed a petition for hearing on February 3, 1964.

On February 13, Kenosha replied to the petition of Auto Convoy, and another filed on behalf of National Trucking Company.

On February 24, 1964, Clark Transport Company (Clark herein) filed a reply as did United.

A similar reply, protest and request for oral hearing, was filed February 25, 1964, on behalf of Convoy Company.

The Commission entered an order December 17, 1964, the effect of which was to grant the application of Kenosha and overrule the pleadings filed on behalf of other parties.

Petitions for reconsideration were filed on behalf of Clark, and United, on February 1, 1965, to which, on February 18, 1965, Kenosha filed a reply.

By order of April 1, 1965, the Commission overruled the petitions of Clark and United, and granted the authority sought by the application on behalf of Kenosha.

Pursuant to the orders entered, Kenosha was granted secondary authority to transport motor vehicles (as specified) throughout points in 27 western, midwestern, southwestern and southern states, and Commercial was granted authority for the transportation in secondary movements of motor vehicles as specified from Irving and Floydada, Texas, to points in Texas.

This is authority in each instance which neither of the carriers theretofore had, which gives rise, therefore, to the view and the insistence, on behalf of these appellants, that the applications are, and should be treated as, applications for new authority.

Implicit in the majority opinion, and recognized in the dissent, is a decision the effect of which, if left to stand, is that the Commission may issue certificates without a basis stated and without a finding of public convenience and necessity. Instead the Commission substitutes convenience of the carrier.

Early in the history of motor carrier regulation, the Commission recognized the difference between "initial" and "secondary" authority, and has heretofore issued, in 1938, its administrative ruling No. 75, as follows:

> "The term 'initial movements' means transportation of **new motor vehicles** from the place of manufacture or assembly, specifically authorized to be served as a point of origin by the originating carrier certificate or

permit, to any point or place upon the authorized route or within its defined territory for delivery to consignee or to a connecting carrier.

"The term 'secondary or subsequent movements' means transportation of motor vehicles, except transportation of new motor vehicles, from a place of manufacture or assembly, by a carrier to, from, and between all points and places upon its authorized route or routes, or within its authorized territory for delivery to consignee or connecting carrier. Such movements also include cross-movements, backhauls, and movements to and from body and specialty plants upon the route or routes or within the authorized territory of the carrier."

Prior to the institution of the present proceeding, both Commercial and Kenosha had only initial authority from points of manufacture to the destination territory to which now, by virtue of the granting of these applications, they will have authority for secondary movements.

The basis on which appellants, and others similarly situated, object to the granting of the application of Kenosha and Commercial arises out of the fact that they, collectively and individually, already have Certificates of Convenience and Necessity issued by the Commission authorizing them to engage in the secondary transportation which the Commission now seeks to authorize Kenosha and Commercial to perform, thereby diluting the traffic presently available to appellants.

The Commission itself laid the predicate for thus granting Certificates of Public Convenience and Necessity when it entered a tentative order in **National Automobile Transporters Assn.—Petition for a Declaratory Order** (hereafter referred to as NATA), 91 M. C. C. 395, in which, *inter alia,* the Commission's tentative order says:

> "If the relief sought is confined to modification to correct outstanding authorities only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers, it may be that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing." 91 M. C. C. 416.

Even that order stated:

> "Such a petition should be filed in the same docket number in which the initial authority has been granted and **would be considered in the same light as an application filed under Section 207 (a) of the act**" (Emphasis supplied). 91 M. C. C. 415.

Section 207 (a) requires hearings, conformity with the Administrative Procedure Act, and a factual finding of public convenience and necessity. "Good cause appearing" does not suffice.

The Commission predicated its procedure upon the NATA decision, even though it was subsequently overruled by the Commission in its proceeding in Ex-Parte 230, **Substituted Service—Charges & Practices of For Hire Carriers & Freight Forwarders (Piggyback Service)**, 322 I. C. C. 301.

All of the pleadings recited above on behalf of those who appeared before the Commission as protestants, demanded, or at least sought, the exercise of the right to a hearing, but none was conducted.

The Questions Raised Are Substantial.

It will be observed from the Statement of Questions Involved that this case concerns itself with procedural

matters. Any consideration of substantive matters has been effectively foreclosed, and, even though the rights of the parties, particularly those of the appellants, have been determined by the Commission, the basis for this determination has yet to be stated, and the parties have been denied an opportunity, guaranteed them by the Constitution, to present to the Commission those matters which they say would impel the Commission to deny the applications of Kenosha and Commercial.

In an era when our minds are being conditioned constantly by the magnitude of daily events, we are understandably prone to take the large view, to be impressed by the headlines of big events that are shaping history. Unless reminded, the inclination to overlook or deprecate small things is nearly irresistible. Only when we come squarely face to face with small procedural matters is it brought to mind the monumental gravity of simple requirements of the law governing procedure. The substance only then is apparent.

We are quite aware of the multiplicity and magnitude of cases presented to this Court for review, and aware as well of the necessity of selecting with discrimination those in which jurisdiction will be noted and plenary consideration given.

The bland statement that only procedural matters are involved, or the statement that "the kind of limited modification granted by the Commission here" justifies a departure from previously established procedure, fails to account at all for the importance procedure does have, or slyly winks at a minute diminution of basic rights.

This Court has traditionally recognized the cumulative effect of minute diminutions of basic rights which in effect is a denial of all rights, and has on many occasions brought its weight to bear in minute situations found to

present opportunities for guarding jealously such rights as only this Court can.

Some of the occasions are mentioned by Davis, in his Administrative Law Treatise, Section 7.20, where he said

> "The essence of justice is largely procedural. Time and again, thoughtful judges have emphasized this truth. Mr. Justice Douglas: 'It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.' Mr. Justice Jackson: 'Procedural fairness and regularity are of the indespensable essence of liberty.' Mr. Justice Frankfurter: 'The history of liberty has largely been the history of procedural safeguards.'
>
> "The law governing the extent of the requirement of opportunity for full hearing is mostly judge-made law, and the standards are essentially the same whether the judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law.
>
> "The central proposition of full hearing is that adjudicative facts—facts pertaining to a party—normally ought not to be found without allowing the party a chance to rebut, explain, and cross-examine."

The decision of the Commission is alleged to be predicated upon the NATA case (91 M. C. C. 395). Yet, in that decision, the Commission recognized:

> "Such a petition should be filed in the same Docket number in which the initial authority has been granted and would be considered in the same light as an application filed under Section 207 (a) of the Act."

The law is quite clear that applications for authority under this section (207(a)) must be processed in conformity with the requirements of the Administrative Procedure Act. **Pinkett v. U. S.**, 105 Fed. Supp. 67; **Riss & Co. v. U. S.**, 341 U. S. 907, 71 S. Ct. 620, 95 L. Ed. 1345 and **Minneapolis & St. Paul Railroad Company v. U. S.**, 361 U. S. 173, 4 L. Ed. 2d 223, 80 S. Ct. 229, in which the Court said, without equivocation:

> "There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission."

The NATA case does not decide, nor could it have decided, that the Administrative Procedure Act is inapplicable to these petitions.

It does not declare that the hearing shall not be held, and it does not declare that the Commission is not required to give a statement of the reasons for its decision.

It does nothing more than to suggest that applications may be handled in a rapid manner.

In addition, the dissenting Commissioners, Murphy and Tuggle, in the NATA decision, pointed out that the decision in the NATA case was "premature and a prejudgment of the issues posed in the general investigation" referring to Ex-Parte 230, **Substituted Service—Charges and Practises of For Hire Carriers and Freight Forwarders (Piggyback Service).**

The requirements of the Administrative Procedure Act are clear. Section 9B requires that the Commission in an application case shall "set and complete any proceedings required pursuant to Sections 7 and 8 of this Act".

No hearing was held.

No opportunity was given for a development of the facts through cross-examination.

The Commission's orders are supported by nothing more than the bald statement "good cause appearing".

Section 7C of the Administrative Procedure Act provides:

> "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and complete disclosure of the facts."

Where, as here, the Court is dealing with such a nebulous phrase as "public convenience and necessity", the requirement for strict adherence to the procedures established by statute are of gravest concern, for in the proceeding before the administrative agency, the opportunity, and the inclination, to ignore, or to treat as having slight significance, statutory requirements is greater than in a judicial proceeding where a judge presiding is normally more inclined than an administrative officer to observe the niceties of procedure.

In the absence of a hearing, no facts could be developed to form the basis for the requirements of the Administrative Procedure Act that the factual basis for the decision of the Commission be stated.

Section 8 (b) (of the Administrative Procedure Act, 5 U. S. C., Section 1007 (b)) provides:

> ". . . . all decisions . . . shall become part of the record and shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record . . ."

These requirements have not been met.

The rights, and the procedural guarantees, of these Appellants, even though they may be considered as slight by the Commission, are rights which are entitled to plenary consideration in this Court.

As pointed out by Judge Bohanon in his dissent, the parties have simply not had a day in court.

We are aware of the proceedings before this Court in the case of **Motor Convoy, Inc. v. U. S.**, 235 Fed. Supp. 250, affirmed *per curiam* 381 U. S. 436.

We are also aware of the proceedings presently pending before this Court in **Convoy Company v. United States and Interstate Commerce Commission**, No. 719, in which we observe that the motion on behalf of the United States and the Commission is largely bottomed upon this Court's *per curiam* affirmance of the District Court of Georgia in the Motor Convoy Case.

In that proceeding, reference is made to the instant case, at page 14 of the Jurisdictional Statement, filed on behalf of the Convoy Company.

The pendency, first of the Motor Convoy case, secondly of the Convoy Company case, thirdly of these two cases, and additionally the pendency of other applications, one of which appears in the records certified to this Court (last document certified by the Commission appearing at page 138, which is an additional application on behalf of Kenosha in its Sub-Nos. 45, 226, 229), demonstrates the importance that these procedural matters have to the motor carrier industry at large.

In affirming the Motor Convoy case, it must be presumed that this Court intended to affirm it in its posture as presented before this Court.

Significantly, the opinion of the District Court in the Motor Convoy case did not consider or decide the effect of the Administrative Procedure Act, but it did effectively restrict its decision to the facts of that particular case, as then presented:

> "We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear that there is relevant testimony that should be considered by the Commission." 235 Fed. Supp. at 253.

We anticipate that this Court will be presented in this case, as it was in the Motor Convoy case and in the Convoy Company case, with a motion to affirm. We respectfully urge that because of the substantial nature, and the substantial number, of such matters as are presently pending before the Courts and the Commission the gravity of the procedural questions is of such a nature as to require plenary consideration by this Court to the end that an "unfortunate precedent" may be replaced by a decision defining conclusively the procedure which the Commission may use and adopt in such matters in conformity with the statutory requirements of the Administrative Procedure Act and the Constitutional requirement of due process.

In summary, we say that the questions involved are so substantial as to require full consideration with briefs and argument from the parties.

CONCLUSION.

Because the Defendant Commission failed in its responsibilities, neglected or ignored statutory requirements, denied these Appellants' rights, and refused to give appro-

priate consideration to determinative issues raised, it is respectfully urged that the orders complained of be set aside, for which in duty bound Appellants will ever pray.

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APPENDIX.

[Omit Caption.]

A-1.

Restraining Order.

Pursuant to the authority contained in Section 2324, Title 28, United States Code, it is ordered that the temporary restraining order heretofore entered in the above captioned cases (now consolidated for all purposes) on September 9, 1965, be and the same hereby is continued in full force and effect until final determination of an appeal to the Supreme Court of the United States from the judgments entered herein, and for so long as said appeal is pending.

Dated this 30th day of September, 1965.

John C. Pickett, Circuit Judge, Luther Bohanon, Edwin Langley, District Judge.

Order Consolidating Cases.

Upon application having been made by the plaintiffs in the above captioned causes, and said cases having presented identical issues and having been consolidated for purposes of trial, it is ordered that the above captioned causes be and the same hereby are consolidated for all purposes.

Dated this 30th day of September, 1965.

John C. Pickett, Circuit Judge, Luther Bohanon, Edwin Langley, District Judge.

* * * * * * *

Langley, District Judge.

The purpose of this action is to set aside an order of the Interstate Commerce Commission entered in its

Docket No. MC-43038 (Sub. No. 404), Commercial Carriers, Inc., Petition for Modification of Existing Certificate.

Commercial Carriers, Inc., of Romulus, Michigan, is the holder of a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission under which it is authorized to engage in the transportation of automobiles in interstate commerce as a common carrier by motor vehicle, limited, however, to the initial movements in truckaway service of new automobiles from the site of the Cadillac factory in Detroit to points in Texas. The order complained of here authorized the modification of the certificate to include the secondary movements of new automobiles in truckaway service from Irving and Floydada, Texas, to points in Texas, but restricted "to traffic originating at the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Michigan, and having an immediately prior movement by rail".

The objection of the plaintiff, United Transports, Inc., of Oklahoma City, Oklahoma, and of the intervening plaintiff, Auto Convoy Company, of Dallas, Texas, is that the modification order is in effect an authorization for a new certificate and should not have been issued except upon a showing and finding of present or future public necessity for the additional service in the area, as provided in Section 207 (a) of the Interstate Commerce Act (49 U. S. C., § 307 (a)), and after an opportunity had been afforded, as required by Section 7 (c) of the Administrative Procedure Act (5 U. S. C., § 1006 (c)), to present oral evidence in opposition to the application and to cross-examine witnesses.

The evidence before the court is the record of the Interstate Commerce Commission in its said Docket No. MC-43038 (Sub. No. 404). The record was introduced

at the hearing by agreement of all the parties. No other evidence was introduced or offered by any of the parties. It appears from this record, no pertinent factual statement of which is denied by any litigant herein, that in May, 1963, Cadillac began shipping its cars to Texas by rail, terminating the shipments at railheads in Irving and Floydada, and that as a consequence Commercial Carriers, Inc. lost all or virtually all of this traffic to Texas. It therefore applied to the Commission, pursuant to the principles and under the procedures established by the Commission in its order entered in National Automobile Transporters Assn.—Petition for Declaratory Order, 91 MCC 395, for a modification of its existing certificate to permit it to recapture part of its lost traffic by authorizing the secondary movement of Cadillacs from these railheads to points in Texas. United Transports, Inc., opposed the application before the Commission on the grounds that it was authorized under its certificate to transport such vehicles between points in Texas, that it was furnishing satisfactory service and had invested heavily in facilities and equipment to that end, that no additional carriers were needed or likely to be needed to provide adequate service, and that if the certificate modification applied for was granted it would suffer substantial loss; and demanded an oral hearing. Upon these facts, and without affording the hearing demanded, the Commission entered its order authorizing the modification. The basis upon which the modification was authorized, in addition to the record before the Commission, is set out in the order as follows:

> "It further appearing, that in its report and order in National Auto Transporters Assn.—Declaratory Order, NATA, 91 M. C. C. 395 (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of 'initial' and 'secondary' authority to transport automobiles should be placed in

a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flat car and multilevel rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers; * * *."

The mention in the order of "initial" and "secondary" authorizations has reference to the classification of certificates and permits into "Initial Movements" and "Secondary Movements" authorizations by Administrative Order No. 75 entered by the Commission in 1938. The "initial" certificates covered transportation of new automobiles from the place of manufacture to the points specified, and the "secondary" certificates covered movements other than initial. When automobile manufacturers began about 1960 to utilize rail transportation to a substantial extent for their shipments, serious problems arose as to the respective rights of "initial" and "secondary" certificate holders. To secure a resolution of the matter by the Commission, the National Automobile Transporters Association filed its petition for a declaratory order. The Commission thereupon made an exhaustive study of the automobile transporters' problems, with numerous interested parties filing pleadings. After concluding that as matters then stood "initial" certificate holders could not under their existing certificates participate in the completion of a shipment of automobiles which began by rail at the factory, the Commission then outlined a method for granting such authority without imposing upon itself and interested parties the burdens incident to the filing of individual motor carrier applications. The procedure established is as follows:

A great burden would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are

necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by the filing of appropriate petitions to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not now cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted and would be considered in the same light as an application filed under Section 207 (a) of the Act.

It should be supported, as a minimum, by verified statements showing the volume and routing of movements which the petitioners transported within a reasonable time prior to the change in movement, and the same data with respect to traffic shipped subsequent to the introduction of rail TOFC and multilevel rail movements. Notice of the filing of such petition will be given by publication in the Federal Register, and interested persons will be given an opportunity to reply. If an existing authority is modified, a petitioner will not be required to relinquish presently held authority, but, at the same time, the change in existing rights will be limited so as not to place petitioner in a position to infringe on the operations of existing carriers. This can be accomplished by appropriately restricting any modification in the authority to meet particular circumstances. See, for example, Auto Convoy Co. Ext.—Secondary Movements from Texas, 86 M. C. C. 614. By the framing of appropriate grants of authority, carriers faced with substantial revenue losses due to these radically changed circumstances in the transportation industry, may seek to obtain appropriate reformation of their present operating authority. If the relief sought is confined to modification to correct outstanding au-

the private and the public interests. The Commission's expertise is needed fully as much for the determination of the one issue as of the other. And for the determination of each of these issues the Commission is equally in need of the presentation of evidence and argument."

And further, at page 802:

"The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law. An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' Trustees of Dartmouth College v. Woodward, U. S. 1819, 4 Wheat. 518, 581, 4 L. Ed. 629 (Webster's argument). As said in Galpin v. Page, U. S. 1873, 18 Wall. 350, 368, 21 L. Ed. 959: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, **and has been afforded an opportunity to be heard.** Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' (Emphasis supplied.) The Commission is not, strictly, a court, but it has quasi-judicial powers and its proceedings must satisfy 'the pertinent demands of due process.'"

The Court further said, at page 803 of the opinion:

"It is concluded, in summary of the foregoing, that if the Act be given a reasonable interpretation, an interpretation resulting in equal application, an inter-

pretation in harmony with the Commission's own administrative construction, and an interpretation which will bring the Act into harmony with the Constitution, the Act must be held to contemplate hearings before the Commission on the issue modification vel non of an outstanding license by the granting of facilities to another station."

The Order of the Federal Communications Commission was reversed.

In this connection, see also Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific Railroad et al. (D. C. D. C.), 237 F. Supp. 404.

There is no difference in principle between the case at bar and the Wilson case, supra.

For the reasons herein stated, I respectfully dissent.

> thorities only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers, it may be that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing.

The procedure established in the NATA declaratory order was approved in Motor Convoy, Inc. v. United States, D. C., 235 F. Supp. 250 (1964), which was affirmed on the merits by the United States Supreme Court in a per curiam decision (381 U. S. 436, 85 S. Ct. 1575, 14 L. Ed. 2d 692). The facts in that case were similar to those here. Dixie Transport Company, a motor carrier, was authorized to handle initial movements of new automobiles from Michigan to points in Georgia and Florida. It applied to the Commission for and was granted a modification of its certificate authorizing it to complete shipments to these points which began by rail and ended at railheads in those states. The basis upon which the modification was authorized was the loss of revenue resulting from the switch by the automobile manufacturer to rail shipments. In denying the demand by Motor Convoy, Inc., to set aside the order, the court said:

> "We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear there is relevant testimony that should be considered by the Commission."

[1, 2] It is clear, therefore, that the procedure followed by the Commission in authorizing the modification of the "initial movements" certificate of Commercial Carriers, Inc. to include "secondary movements" of its former

traffic shipped part way by rail from the factory site, has the sanction of the United States Supreme Court and is not open to question here. To the extent that plaintiffs rest their complaint on the failure of the Commission to afford an oral hearing and to find public necessity for additional service, it is without merit. If they are to prevail it must be because the facts before the Commission did not warrant the action taken or because of relevant testimony or other evidence that should have been considered by the Commission but was not. We find nothing to indicate that any evidence in the record before the Commission was not considered, and nothing to indicate that other relevant evidence was available. In its demand for oral hearing no showing was made by United Transports, Inc. as to what it proposed to develop thereby in the way of relevant testimony, and the Commission so found. Nor has any such showing been made here.

[3, 4] With respect to the evidence upon which the Commission acted, plaintiffs characterize the Commission as arbitrary, capricious, palpably wrong, and abusive of its discretion in authorizing the modification in the face of the undisputed fact that the service already supplied was satisfactory and sufficient and that to authorize additional, unneeded service would work a serious financial hardship on them. But they overlook or refuse to see that these facts are not determinative. The purpose of the Commission was to provide Commercial Carriers with a means to re-establish part of its lost traffic if it could, following the conclusion reached in the NATA decision that in situations such as this it was in the public interest to do so. And however much they may complain, it is obvious from the record that any gain in the secondary movements of Cadillacs in Texas realized by the plaintiffs had to come at least in part as the result of the loss of traffic by Commercial Carriers—and it is for this lost traffic only that Commercial is being allowed to compete.

Nor is it determinative that United Transports has invested heavily in anticipation of its windfall of the traffic lost by initial certificate holders such as Commercial Carriers, and stands now to lose by it. The Commission cannot allow its hands to be tied from acting in what it considers the public interest because of investments made by individual carriers.

The court is of the opinion, therefore, that upon the basis of the facts before it the Commission acted within the procedures and principles established in the NATA decision in entering the modification order. And since it does not appear that it failed to consider any relevant facts in evidence, or to afford a hearing as to any such evidence, plaintiffs' complaint should be dismissed and the order allowed to stand.

Bohanon, District Judge (dissenting).

The able opinion written by the majority of the Court sets forth the pertinent portions of the record before the Interstate Commerce Commission and will not be reiterated in this dissent except perhaps in one or two respects.

I cannot find myself in accord with the legal conclusions reached by the majority of the Court. The majority opinion concurs in the conclusion of the Interstate Commerce Commission that the Order complained of herein is a "modification" of a pre-existing authority of the applicant. The Interstate Commerce Commission by its Order did not modify the pre-existing Order of the applicant, Commercial Carriers, Inc., but granted additional authority.

Commercial Carriers, Inc., had authority to engage in the transportation of automobiles in Interstate Commerce as a common carrier by motor vehicle as an initial car-

rier of movements in truck-away service of new automobiles from the site of the Cadillac factory in Detroit, to points in Texas. The Order complained of here in no sense modified Commercial Carriers, Inc., authority, but granted additional authority, which is known as "secondary authority" of new automobiles in truckaway service from points in Texas to other points in Texas.

A definition of the term "initial authority" and "secondary authority," as defined by the Interstate Commerce Commission, is as follows:

> "The term 'initial movements' means transportation of new motor vehicles from a place of manufacture or assembly, specifically authorized to be served as a point of origin by the original carrier's certificate or permit, to any point or place upon the authorized route or within its defined territory for delivery to consignee or to a connecting carrier.
>
> "The term 'secondary or subsequent movement' means transportation of motor vehicles, except transportation of new motor vehicles from a place of manufacture or assembly, by a carrier to, from, and between all points and places upon its authorized route or routes or within its authorized territory for delivery to consignee or connecting carriers. Such movements also include cross movements, backhauls, and movements to and from body or specialty plants upon the route or routes or within the authorized territory of carrier."

So it is plain to see from the Commission's own definition of initial and secondary movements that they relate to altogether different types of authority.

When the Commission by the Order complained of in this case granted Commercial, the initial carrier, the right to engage also in secondary or subsequent movements, it

certainly cannot be said that the Commission modified Commercial's authority, but definitely extended the authority.

The Commission entered this so-called modification order without any evidence whatsoever of a showing of public convenience and necessity therefor. The record which was introduced in this case is absolutely barren of any testimony or evidence showing a public convenience and necessity for the issuance of the certificate complained of. The record is barren of any evidence showing that the protestants in this case were not fit, willing, and able to perform the service granted to Commercial.

There were several protestants to the granting of the certificate to Commercial with requests for hearing before the Commission and the right to produce oral testimony. These requests and these objections were ignored and denied, and the certificate and order complained of here was issued and granted without a hearing, in violation of Section 207 (a) of the Interstate Commerce Act, 49 U. S. C., § 307 (a), which in pertinent part provides:

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

Thus the grant of Congressional authority gave the Commission the power or the right to grant certificates

upon a showing of present or future public convenience and necessity only. There is no showing in this case by any evidence or anything else in the record for the granting of the certificate that the public convenience and necessity required the service. The Order of the Commission merely states: "And good cause appearing therefor;" the complained of order was issued. The record is barren of anything to show "good cause" unless it can be said that the Commission from the record felt that it had a duty to favor Commercial because of purported loss of some of Commercial's business.

I do not intend to reflect upon the Commission, but I can find from the record no other apparent reason.

Furthermore, in addition to the lack of compliance with Section 207 (a) of the Interstate Commerce Act, 49 U. S. C., § 307 (a), the Commission refused, upon request of protestants, to grant a hearing as provided by the Administrative Procedure Act, Section 9 (b), 5 U. S. C. A., § 1008 (b); Section 7 (c) of the Act, 5 U. S. C. A., § 1006 (c); Section 8 (b) of the Act, 5 U. S. C. A., § 1007 (b).

The Commission had a lengthy hearing in what is referred to as the "NATA case," and concluded, 91 M. C. C. 415-16, as follows:

> "A great burden would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by the filing of appropriate petitions to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not

now cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted and would be considered in the same light as an application filed under section 207(a) of the act.

"It should be supported, as a minimum, by verified statements showing the volume and routing of movements which the petitioners transported within a reasonable time prior to the change in movement, and the same data with respect to traffic shipped subsequent to the introduction of rail TOFC and multilevel rail movements. Notice of the filing of such petition will be given by publication in the Federal Register, and interested persons will be given an opportunity to reply. If an existing authority is modified, a petitioner will not be required to relinquish presently held authority, but, at the same time, **the change in existing rights will be limited so as not to place petitioner in a position to infringe on the operations of existing carriers. This can be accomplished by appropriately restricting any modification in the authority to meet particular circumstances.** See, for example, Auto Convoy Co. Ext.—Secondary Movements from Texas, 86 M. C. C. 614. By the framing of appropriate grants of authority, carriers faced with substantial revenue losses due to these radically changed circumstances in the transportation industry, may seek to obtain appropriate reformation of their present operating authority. **If the relief sought is confined to modification to correct outstanding authorities only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers, it may be that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing.**" (Emphasis supplied.)

The Interstate Commerce Commission has no authority, over objections of a protesting carrier, to grant authority without a hearing where both parties can present their evidence and objections. This is so despite the order of the Commission in the NATA case. If the Commission desires such authority as it has exercised in this case, it must secure it from Congress and not take the authority by enacting its own laws.

The due process clause of the Fifth Amendment as hereinafter quoted requires that claims be appropriately set forth so that they may be open to challenge and opposing evidence, and a hearing be accorded at some stage of the administrative proceeding. Under this Amendment, it is doubtful if Congress has the authority to grant to the Interstate Commerce Commission the authority to issue certificates of convenience and necessity without a hearing to opposing parties who may be injured by the granting of such authority.

In the majority opinion, the Court states:

> "Nor is it determinative that United Transports has invested heavily in anticipation of its windfall of the traffic lost by initial certificate holders such as Commercial Carriers, and stands now to lose by it."

The majority of the Court further states:

> "The purpose of the Commission was to provide Commercial Carriers a means to re-establish part of its lost traffic if it could."

I feel that these two statements can be clearly answered. In the first one, United Transports has not received a windfall. It had its business and equipment arranged to take care of such traffic as is involved in this action. The only windfall is that Commercial Carriers received a certificate to carry automobiles in secondary movements with

the stated purpose to provide Commercial Carriers with means to re-establish part of its lost traffic if it could, and without authority to do so by the procedure it followed.

It is my view that the Commission had no authority, statutory or otherwise, to protect Commercial Carriers because it lost some business. This is a hazard that Commercial Carriers took when it began its business operations. Furthermore, as hereinabove stated, if Commercial Carriers were entitled to the certificate granted, it was required to make a showing of public convenience and necessity, which it has not done, and the Commission was further required, under the authorities hereinbefore stated, to grant the protesting carriers who already had the authority to appear at a hearing, cross-examine witnesses of the applicant Commercial, and offer evidence in opposition thereto. The record in the case shows that United Transports, Inc., had an investment in Texas, as shown by its Exhibit A, of $2,930,463, which does not include property not owned by United Transports, Inc., but used in its operation at Houston, Texas, the cost of which was $193,265, and it had a definite right to protect its authority and thus protect its investment.

Amendment 5 to the Constitution provides:

> "* * * nor be deprived of life, liberty, or property, without due process of law."

An interesting case involving a license from the Federal Communications Commission is L. B. Wilson, Inc. v. Federal Communications Commission, 83 U. S. App. D. C. 176, 170 F. 2d 793 (C. C. D. C.). The Court at page 800 said:

> "(4) The solution is not found in express terms in the Communications Act. Section 312 (b) set forth above is silent on the question whether a hearing shall be granted by the Commission on the issue

whether or not (indirect) modification of an outstanding license will be occasioned by the granting of requested facilities to a new station. The section does not in terms provide for such a hearing; neither does it in terms forbid it. The same is true of the Act as a whole. It must therefore be construed. We think that properly construed it contemplates a hearing on the issue stated. We reach this view upon the following grounds:

"(5, 6) First: In the construction of a statute its provisions should if possible be given a reasonable meaning. Unreasonable consequences should be avoided. Cf. United States v. American Trucking Associations, 1940, 310 U. S. 534, 543, 60 S. Ct. 1059, 84 L. Ed. 1345. It would give an unreasonable meaning to the Communications Act, in view of the purpose of the Act and of the Commission's duties under it, to construe it as not contemplating a hearing to an outstanding licensee on the question whether the extension of facilities to another station will constitute an indirect modification of his license. The purpose of the Act is to protect and promote the public interest in broadcasting, but the Act also, as pointed out above, recognizes the private interest of licensees. The Commission is to furnish expertise in the administration of the Act. It would be unreasonable for Congress to deny a hearing to an outstanding licensee on the issue whether or not the extension of facilities to another station will cause objectionable interference within the protected contour of the outstanding license and thereby indirectly modify the same, but to accord a hearing, as the Act does (as construed by the Supreme Court in the KOA case), on the issue whether or not the public interest requires such modification. Each of such issues, as pointed out above, is of critical importance to both

A-2.

Restraining Order.

Pursuant to the authority contained in Section 2324, Title 28, United States Code, it is ordered that the temporary restraining order heretofore entered in the above captioned cases (now consolidated for all purposes) on September 9, 1965, be and the same hereby is continued in full force and effect until final determination of an appeal to the Supreme Court of the United States from the judgments entered herein, and for so long as said appeal is pending.

Dated this 30th day of September, 1965.

John C. Pickett, Circuit Judge, Luther Bohanon, Edwin Langley, District Judges.

Order Consolidating Cases.

Upon application having been made by the appellants in the above captioned causes, and said cases having presented identical issues and having been consolidated for purposes of trial, it is ordered that the above captioned causes be and the same hereby are consolidated for all purposes.

Dated this 30th day of September, 1965.

John C. Pickett, Circuit Judge, Luther Bohanon, Edwin Langley, District Judges.

Langley, District Judge.

This is an action to set aside an order of the Interstate Commerce Commission.

The record before the Commission at the time the order complained of was issued has been introduced in this pro-

ceedings and is the only evidence before the court. From this record it appears that Kenosha Auto Transport Corporation of Kenosha, Wisconsin, is the holder of Certificates of Public Convenience and Necessity under which it is authorized to transport as a driveaway hauler, trucks and other motor vehicles from the manufacturing and assembly plants of International Harvester Company at Bridgeport, Connecticut, Fort Wayne, Indiana, and Springfield, Ohio, to destination points in some twenty-seven states. During the years 1960, 1961, and 1962, it averaged transporting in excess of 50,000 vehicles a year from these plants. In November, 1962, International Harvester began utilizing rail shipments, and in 1963 shipped approximately 15,000 vehicles by that means. Although because of increased production by International Harvester, Kenosha's actual loss in traffic was only about 3,000 vehicles below its average for the preceding three years, the loss of revenue from what it would have been except for the rail shipments was substantial. Further, International Harvester's plans were for a continued increase in the use of rail transportation to the twenty-seven state area served by Kenosha. On December 2, 1963, in Docket No. MC-30837 (Sub. No. 185), Kenosha filed a petition with the Commission in which it set out these facts and asked for a modification of its certificates which would allow it to pick up at the destination railheads the traffic shipped from these plants by rail and to continue the shipments by motor carrier to final destination points in the twenty-seven state area. The application was made following the entry of a decision by the Commission on October 15, 1963, in National Auto Transporters Association—Petition for Declaratory Order, 91 M. C. C. 395, holding that "initial" certificate holders such as Kenosha could not complete shipments begun by rail, but establishing principles and procedures under which modifications of existing certificates could be secured to allow such "secondary" hauling.

By its order entered December 9, 1964, the Interstate Commerce Commission authorized the modification applied for in accordance with the principles and procedures it had established in the NATA decision. The order was entered over the objections of United Transports, Inc., of Oklahoma City, Oklahoma, and Clark Transport Company of Chicago Heights, Illinois, plaintiffs herein, and Auto Convoy Company of Dallas, Texas, intervening plaintiff, and others not appearing in this proceedings. Their objections were primarily that no public necessity for additional service from the railheads had been or could be shown, that they were rendering satisfactory service and could continue to do so, that to permit Kenosha to participate in the traffic would result in financial loss to them, and that to issue the modification requested without a finding of public need for the service after a full hearing in the manner of an application for a new certificate would be arbitrary, capricious, an abuse of discretion, wholly wrong and wholly illegal. And those same objections are raised here as grounds requiring the order to be set aside.

In United Transports, Inc. v. United States, Case No. 65-118 on the docket of this court, in an order entered this date, we sustained the authority of the Commission to enter a similar order under similar facts, relying on Motor Convoy v. United States, D. C., 235 F. Supp. 250, affirmed on its merits on appeal to the Supreme Court in a per curiam decision (381 U. S. 436, 85 S. Ct. 1575, 14 L. Ed. 2d 692), as establishing the legal sufficiency of the procedure laid down in the NATA declaratory order. The application here fully complies with the NATA procedures, and nothing before this court indicates that the Commission did not consider all factual representations made by the protestants as well as by the applicant. There are no representations of facts in the proceedings before the Commission, all of which are accepted as true, that re-

quire setting aside the order as having been entered outside the principles of the NATA case. There is nothing in the record before the Commission to indicate what evidence relevant to the issues, if any, would have been offered to the Commission if an oral hearing had been granted. And no such evidence has been offered here.

In these circumstances, and for the reasons set out in Case No. 65-118, 245 F. Supp. 561, referred to above, we are of the opinion, and so find, that the complaint herein should be denied and the action dismissed.

Bohanon, District Judge (dissenting).

The questions presented in this case are identical with those presented in my dissent in Case No. 65-118, 245 F. Supp. 566, and I therefore adopt for the purpose of this case my Dissenting Opinion in Case No. 65-118.

A-3.

Service Date
March 31, 1965

Order.

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 25th day of March, A. D. 1965.

No. MC-43038 (Sub-No. 404)

Commercial Carriers, Inc.
(Romulus, Mich.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of United Transports, Inc., protestant, filed February 8, 1965, for reconsideration of the order of December 17, 1964, modifying Certificate No. MC-43038 (Sub-No. 404);

(2) Reply by Commercial Carriers, Inc., filed March 1, 1965;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied for the reasons (a) that the order of December 17, 1964, by Division 1, was entered in accordance with the law after it appeared applicant's certificate in No. MC-43038 (Sub-No. 404) should be modified and petitioners' petitions for oral hearing denied, (b) that at the time applicant's petition for modification (which gave rise to this proceeding, filed July 19, 1963) was published in the Federal Register, ample opportunity was afforded interested persons to submit written statements and arguments, factual and legal, supporting their respective positions, (c) that statements and arguments were filed

and considered in the disposition of the said petition of July 19, 1963, (d) that protestant has not shown what evidence, if any, will be offered if an oral hearing were held, (e) that the statements and arguments of position by protestants of record do not require or support a different conclusion than that reached in the said order of December 17, 1964, and (f) that no sufficient or proper cause appears for vacating or reconsidering the order of December 17, 1964. Compare **The Motor Convoy, Inc., et al. v. U. S.**, 235 F. Supp. 250;

It is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217, and 221 (c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the order entered herein on December 17, 1964, shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Bertha F. Armes,
Acting Secretary.

(Seal)

A-4.

Service Date
April 1, 1965

Order.

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 25th day of March, A. D. 1965.

No. MC-30837

No. MC-30837 (Sub-No. 185)

Kenosha Auto Transport Corporation
(Kenosha, Wis.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Clark Transport Company, protestant, filed February 1, 1965, for reconsideration of order of December 9, 1964, modifying Certificates Nos. MC-30837 and MC-30837 (Sub-No. 185);

(2) Petition of United Transports, Inc., protestant, filed February 1, 1965, for reconsideration of order of December 9, 1964, modifying Certificates Nos. MC-30837 and MC-30837 (Sub-No. 185);

(3) Reply by Kenosha Auto Transport Corporation, petitioner, filed February 18, 1965;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied for the reasons (a) that the order of December 9, 1964, by Division 1, was entered in accordance with the law after it appeared applicant's certificates in Nos. MC-30837 and MC-30837 (Sub-No. 185) should be modified and petitioners' petitions for oral hearing denied,

(b) that at the time applicant's petition for modification (which gave rise to this proceeding, filed December 2, 1963) was published in the Federal Register, ample opportunity was afforded interested persons to apprise themselves of the contents of applicant's verified statements in support of the modification sought and to submit written statements and arguments, factual and legal, supporting their respective positions, (c) that statements and arguments were filed and considered in the disposition of the said petition of December 2, 1963, (d) that protestants have not shown what evidence, if any, will be offered if an oral hearing were held, (e) that the statements and arguments of position by protestants of record do not require or support a different conclusion than that reached in the said order of December 9, 1964, and (f) that no sufficient or proper cause appears for vacating or reconsidering the order of December 9, 1964. Compare **The Motor Convoy, Inc., et al. v. U. S.**, 235 F. Supp. 250;

It is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217, and 221 (c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the order entered herein on December 9, 1964, shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Bertha F. Armes,
Acting Secretary.

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, AND AUTO CONVOY CO., *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal From the United States District Court For the Western District of Oklahoma

MOTION TO AFFIRM

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Dated: January 28, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, AND AUTO CONVOY CO., *Appellants*

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On Appeal From the United States District Court For the Western District of Oklahoma

---

MOTION TO AFFIRM

Comes now Kenosha Auto Transport Corporation (Kenosha), appellee in intervention, and respectfully files its motion to affirm pursuant to Rule 16(1)(c) of the Rules of this Court.

I

Appellees, the United States and the Interstate Commerce Commission, have properly set forth in their motion the background of this proceeding as well as this Court's rulings, *per curiam,* in two prior cases involving the same legal issues as here, i.e., *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250, affirmed 381 U.S. 436; and *Convoy Company* v. *United States,* D. Ore., unreported, affirmed *per curiam,* No. 719, ... U.S.L. Week ....., (U.S. January 17, 1966).

II

Appellants obviously are seeking to divert traffic (International Harvester Company trucks) to their lines or at least delay the modification of Kenosha's certificates as long as possible, apparently expecting to continue to enjoy "windfall" traffic during the lengthy administrative process. They would have the Court treat Kenosha's petition for modification as an application for new authority, notwithstanding that Kenosha's original applications, filed years ago, were subjected to the hearing process and a public need for Kenosha's service in the transportation of International Harvester trucks was *then* established.[1]

Appellants would have Kenosha establish again a public need for its service in the transportation of International Harvester trucks; this time from the destination railheads rather than from the manufactur-

---

[1] It should be noted that, in accordance with the decision in *National Automobile Transporters Assn. Petition For Declaratory Order,* 91 M.C.C. 395, 415 (N.A.T.A.), Kenosha filed its petition for modification in the same dockets in which its initial authorities had been granted.

ing or producing plants. Meanwhile, appellants would be transporting the traffic under operating rights which were issued with *other than* the instant traffic in mind. Attached to Kenosha's petition for modification is an affidavit from an official of International Harvester, attesting to the fact that it has utilized the services of Kenosha for over thirty years, that it was now shipping its vehicular traffic by rail, and that it desired to utilize Kenosha's service in the future from the destination railheads. Appellants did not, and could not, dispute any of these averments.

III

Kenosha is not seeking "to dilute" any other carrier's traffic; it is merely trying to retain that traffic which it handled for years. That is why it filed the Motion To Vacate the Temporary Restraining Order, which apparently has been ignored, as well as its Opposition To The Motion For Stay, both of which are part of the record on appeal.

The Commission's procedure, established in *N.A.T.A., supra,* relative to the modification of existing certificates of the over-the-road carriers of automobiles and trucks, is a reasonable exercise of administrative discretion and expertise. The procedure should not be disturbed at the behest of carriers hoping to gain at the expense of the initial or long-haul automobile transporters. The Commission's decision in *N.A.T.A.* is a presently effective decision of the entire Commission. It was not reversed or overruled by any other decision of the Commission. Appellants are grasping at technicalities in their quest to inherit all post-rail automobile and truck traffic. The applicable law as well as the equities are in favor of the appellees.

Conclusion

It is respectfully submitted that the questions presented lack substantiality. The issues have been decided by this Court in *Motor Convoy* and in *Convoy, supra.* The judgment of the district court should be affirmed.

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Of Counsel:

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Certificate of Service

I hereby certify that I have, on this 28th day of January 1966, served a copy of the foregoing motion to affirm by first-class mail upon all counsel of record.

PAUL F. SULLIVAN

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing two actions (consolidated by the court for all purposes) to set aside orders of the Interstate Commerce Commission in two separate application proceedings.[1] The orders

[1] Appellants have reprinted in their jurisdictional statement only the Commission orders denying reconsideration in the two proceedings. The Commission's original orders in Docket

205-740—66——1

granted the petitions of Commercial Carriers, Inc. and Kenosha Auto Transport Corporation for certain limited modifications of their certificates. This appeal represents the third occasion on which this Court has been called upon to review judgments dismissing essentially indistinguishable certificate modification orders. *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250 (N.D. Ga.), affirmed *per curiam,* 381 U.S. 436; *Convoy Company* v. *United States,* D. Ore., unreported, affirmed *per curiam,* Oct. Term, 1965, No. 719 (January 17, 1966).

Certificates authorizing interstate motor transportation of automobiles are generally limited either to "initial authority," which authorizes movements of new automobiles from manufacturing or assembly plants, or to "secondary authority," authorizing all other movements. Such classifications, however, reflect an older pattern of transportation of automobiles—transportation entirely by motor carriers. In recent years, this pattern has changed radically as the result of the advent of coordinated rail-motor service.[2] New automobiles now move from the manufacturing or assembly plant largely by rail for the line-haul movement, with the motor carrier portion of the transportation limited to the short hauls to or from the railroads.

No. MC–43038 (Sub-No. 404), *Commercial Carriers, Inc., Petition for Modification of Certificate* and Docket Nos. MC–30837 and 30837 (Sub-No. 185), *Kenosha Auto Transport Corporation, Petition for Modification of Certificate*, not reprinted in the jurisdictional statement, are reprinted in the appendix, *infra*, pp. 9–15.

[2] Trailer-on-flatcar service ("TOFC") and multi-level rail car service ("MLRC").

Responding to the changed situation, the Commission in *National Automobile Transporters Association, Petition for Declaratory Order*, 91 M.C.C. 395 (*NATA*), issued a comprehensive ruling clarifying the status of motor carriers in regard to coordinated rail-motor movements. The Commission first ruled that where the traffic leaves the point of origin by rail, a motor carrier holding initial authority is not authorized to perform the remaining motor portion of the movement, i.e., from the destination railhead to the consignee. Second, noting that the new pattern of rail-motor transportation of automobiles has caused a sharp decrease in the tonnage and revenues of motor carriers with initial-authority certificates, the Commission ruled that such a motor carrier might use an expedited procedure to secure a modification of its "initial authority" certificate permitting it to handle the motor portion of its own former traffic. But such modification—which could be secured upon a showing of the volume and routing of movements before and after the introduction of coordinated rail-motor service (91 M.C.C. at 415)—would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement [of its own former traffic], and not to encroach on the rights of other existing carriers" (*id.* at 416). The Commission expressed the hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (*ibid.*).

The Commission's orders here in issue (J.S. App. A–3, A–4; and App., *infra*, pp. 9–15) granted the pe-

titions of Commercial Carriers, Inc., and Kenosha Auto Transport Corporation for a limited modification of their motor common carrier certificates pursuant to the *NATA* ruling. Commercial had been authorized under its certificate to transport new automobiles from the Cadillac plant in Detroit to points in Texas. This traffic now moves from the plant to destinations in Texas by rail; from there it moves by motor carrier. The modification permits Commercial to continue in competition for a portion of the traffic it has lost by authorizing it to carry from the rail destinations to the points in Texas it was originally certificated to serve. Under its certificate, Kenosha was authorized to transport trucks from the International Harvester plants at Ft. Wayne, Ind., Springfield, Ohio, and Bridgeport, Conn., to a 27 state area. The modification granted to Kenosha has a similar effect to that granted to Commercial.

The three-judge district court (with one dissent) sustained the Commission's orders, holding that the Commission had acted in accordance with the procedures and principles established in *NATA* and approved in *Motor Convoy* (J.S. App. A–1, pp. 22–24). The dissenting judge made no mention of *Motor Convoy,* but rested his dissent on points previously rejected in *Motor Convoy,* and more recently in *Convoy* (J.S. App. A–1, pp. 24–33).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's orders were issued pursuant to criteria and procedures originally upheld last Term by the

Court, *Motor Convoy, Inc.* v. *United States, supra,* and again in this Term, *Convoy Company* v. *United States, supra.* The principal legal and factual issues raised by appellants have been twice presented and decided.

1. Appellants argue (J.S. 7–9, 12–15) that the limited modifications granted Commercial Carriers and Kenosha to enable them to participate in coordinated rail-motor movements between the points named in their certificates should be treated the same as the grant of a *new* certificate of public convenience and necessity, and that the Commission, therefore, was required to conduct a hearing for the purpose of determining whether the new service was required by the shipping public and whether the services of the protesting carriers, such as appellants, were inadequate. However, as expressly held in *Motor Convoy,* the kind of limited modifications granted by the Commission here, restricted as they are to the precise traffic Commercial Carriers and Kenosha transported prior to the advent of coordinated rail-motor service,[3]

[3] Verified statements filed by Commerce Carriers and Kenosha and not disputed by appellants showed the volume and routing of the pertinent traffic transported by them from the origin points to destination areas both before and after the shift to coordinated rail-motor movement. The modifications granted by the Commission authorize Commercial Carriers and Kenosha, respectively, to transport automobiles and trucks in "secondary movements" from points in the destination areas to other points in such areas, but restrict the movements to such automobiles and trucks moving only from their previously certificated manufacturing plant origins and "having an immediately prior movement by rail"—thus strictly limiting Commercial and Kenosha to the remaining motor portion of their own former traffic (Appendix, *infra*, pp. 11–12, 14).

do not enable the carrier to institute a new service in competition with other carriers, and hence the standards for determining whether a new certificate should be issued are wholly inapplicable. "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." *Motor Convoy, Inc.* v. *United States, supra,* 235 F. Supp. at 253. Carriers such as the present appellants "would not be affected by the situation" (*ibid.*), since the modifications merely permit Commercial and Kenosha to carry their own former traffic, not appellants' traffic, and create no new service to compete for appellants' traffic.

Appellants' invocation of hearing requirements of Section 7 of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006(c), adds nothing, since it depends upon the assumption rejected in both *Motor Convoy* and *Convoy,*[4] that a new service is created. Moreover, as the court below found, appellants, in their requests for oral hearing, neither controverted the evidence submitted with the applications nor

[4] Appellants argument as to the Administrative Procedure Act was explicitly made and rejected in *Convoy.* Appellants' contention (J.S. 9, 12) that the *NATA* decision, governing both the procedure and relevancy of the issues in these proceedings, was subsequently overruled in Ex Parte 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, was also raised and rejected in *Convoy.*

made any showing that they would produce testimony relevant to the pertinent issues in the light of the *NATA* decision (J.S. App. A–1, 23–24, 36–37). Since appellants had been afforded an opportunity to do this in their submissions, the requirements of fair procedure were fully satisfied. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; cf., *Riss & Co.* v. *United States*, 117 F. Supp. 296, 301–302, 304 (W.D. Mo.), affirmed, 346 U.S. 890.

2. Appellants contend that the Commission's orders are deficient for lack of adequate findings as to public convenience and necessity (J.S. 7, 9) and for failure to state the factual basis of the decision as required by Section 8 of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. 1007(b), (J.S. 12–14). Again, these same arguments were rejected in *Convoy* with respect to the orders in that case which were identical in all material respects with the instant Commission orders—containing the same rulings in the same language on the same issues. Here, as in *Convoy*, the Commission's orders specifically refer to the uncontroverted facts in the petitions of Commercial Carriers and Kenosha, to the Commission's prior decision in *NATA* and the criteria there established, and to the *Motor Convoy* decision—thus making amply clear the basis upon which the agency was proceeding.

CONCLUSION

This appeal presents no substantial issue that has not already been decided by this Court in the *Motor Convoy* case and again this Term in the *Convoy* case.

Plenary consideration is not warranted, and the judgment below should be affirmed.

Respectfully submitted.

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Solicitor General.
DONALD F. TURNER,
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HOWARD E. SHAPIRO,
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ROBERT W. GINNANE,
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Interstate Commerce Commission.

FEBRUARY 1966.

APPENDIX

Service Date, December 17, 1964.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 9th day of December, A.D. 1964.

No. MC–30837

No. MC–30837 (Sub-No. 185)

KENOSHA AUTO TRANSPORT CORPORATION

(Kenosha, Wis.)

It appearing, That Certificates No. MC-30837 dated April 15, 1955, and No. MC–30837 (Sub-No. 185) dated February 15, 1957, were issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of described motor vehicles and parts from and to the points described in the appendix hereto;

It further appearing, That in its report and order in *National Auto. Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure

for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Kenosha Auto Transport Corporation, filed December 2, 1963, for modification of certificates;

(2) Petition of National Trucking Company, protestant, filed January 27, 1964, for a stay of the proceedings, embracing a petition for consolidation with Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practice of For-Hire Carriers of Automobiles;*

(3) Petition of Auto Convoy Co., protestant, filed February 3, 1964, for dismissal of the petition in (1) above, embracing a request for oral hearing;

(4) Reply by United Transports, Inc., protestant to petition in (1) above, filed February 24, 1964;

(5) Reply by Clark Transport Company, protestant to petition in (1) above, filed February 24, 1964, embracing a request for oral hearing;

(6) Reply by Convoy Company, protestant, filed February 25, 1964, for dismissal of the petition in (1) above and for a stay of the proceedings, embracing a request for oral hearing;

(7) Reply by Kenosha Auto Transport Corporation, applicant, filed February 13, 1964, to motions in (2) and (3) above;

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificates No. MC–30837, dated April 15, 1955, and No. MC–30837 (Sub-No. 185), dated February 15, 1957, which authorize, as here pertinent, the transportation of the commodities described in (1) and (2) of the next succeeding paragraph, in initial movements, in truck-

away service, be modified as set forth in the following paragraph;

It is ordered, That upon full compliance by Kenosha Auto Transport Corporation with the requirements of section 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, Certificates No. MC–30837, dated April 15, 1955, and No. MC–30837 (Sub-No. 185), dated February 15, 1957, be, and they are hereby, modified, by adding to the certificates, the following:

(1) In No. MC–30837, *trucks, truck tractors, chassis, and station-wagon type vehicles on truck chassis* designed to transport passengers and property, with or without bodies and parts thereof, in secondary movements, in truckaway service, over irregular routes, between points in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming and points in the Upper peninsula of Michigan, restricted to the transportation of vehicles manufactured or assembled at International Harvester Corporation plants at Fort Wayne, Ind., or Springfield, Ohio, which have had an immediately prior movement by railroad; and

(2) In No. MC–30837 (Sub-No. 185), *motor vehicles* (other than automobiles) *and chassis,* in secondary movements, in truckaway service, and parts of, or accessories for such vehicles, when transported therewith, over irregular routes, between points, in Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon,

South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming and points in the Upper peninsula of Michigan, restricted to the transportation of vehicles manufactured or assembled at International Harvester Corporation plants at Bridgeport, Conn., which have had an immediately prior movement by railroad.

It is further ordered, That except to the extent granted above, the petitions and motions, be, and they are hereby, denied and overruled, respectively;

It is further ordered, That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY, *Secretary.*

Pertinent authority in Certificate Nos. MC–30837 and MC–30837 (Sub-No. 185), sought to be modified.

Irregular Route:

In No. MC–30837—*Trucks, truck-tractors, chassis, and station-wagon type vehicles on truck chassis* designed to transport passengers and property, with or without bodies and parts thereof, in initial movement, in truckaway service, from Fort Wayne, Ind., and Springfield, Ohio, to all points in the United States.

In No. MC–30837 (Sub-No. 185)—*Motor vehicles* (other than automobiles) and *chassis,* in initial movements, in driveaway and truckaway service, and parts of or accessories for, such vehicles, when transported therewith, routes, from Bridgeport, Conn., to points in the United States.

Service Date, December 23, 1964.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 17th day of December, A.D. 1964.

No. MC–43038 (Sub–No. 404)

COMMERCIAL CARRIERS, INC.

(Romulus, Mich.)

It appearing, That Certificate No. MC–43038 (Sub–No. 404), dated August 1, 1958, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of new automobiles, in initial movements, in truckaway service, from the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Mich., to points in Texas;

It further appearing, That in its report and order in National Auto Transporters Assn.—Declaratory Order, NATA 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

It further appearing, That by order of March 3, 1964, the Commission, Division 1, denied modification of the above-entitled certificate;

And it further appearing, That in its petition for reconsideration petitioner limits the modification sought to the origin points of Irving and Floydada, Tex.;

Upon reconsideration of the record in the above-entitled proceeding, and of:

(1) Petition of Commercial Carriers, Inc., filed April 20, 1964, for reconsideration of the order of the Commission, Division 1, dated March 3, 1964, denying modification of authority;

(2) Reply by United Transports, Inc., protestant, filed May 1, 1964, embracing a request for oral hearing;

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificate No. MC–43038 (Sub-No. 404), dated August 1, 1958, be modified as set forth in the next succeeding paragraph;

It is further ordered, That upon full compliance by Commercial Carriers, Inc., with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, Certificate No. MC–43038 (Sub-No. 404), dated August 1, 1958, be modified by adding thereto the following:

New automobiles, in secondary movements, in truckaway service from Irving and Floydada, Tex., to points in Texas, restricted to traffic originating at the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Mich., and having an immediately prior movement by rail.

It is further ordered, That the motion in (2) above be, and it is hereby, overruled, for the reason that disposition of the issues involved can be resolved on the basis of the information of record, and no good cause appears at this time for assigning the matter for oral hearing;

It is further ordered, That, except to the extent modification is granted in the immediately preceding

paragraph, the relief sought be, and it is hereby, denied;

And it is further ordered, That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

[SEAL] HAROLD D. MCCOY, *Secretary.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY and AUTO CONVOY CO.,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM, BRIEF IN SUPPORT, AND CERTIFICATE OF SERVICE FILED ON BEHALF OF INTERVENING APPELLEE, COMMERCIAL CARRIERS, INC.

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IN THE

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UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY and AUTO CONVOY CO.,

Appellants,

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THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, Commercial Carriers, Inc. moves that the judgment of the United States District Court for the Western District of Oklahoma be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

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Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORT CORPORATION,

Appellees.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

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IN THE

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THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, Commercial Carriers, Inc., files this its Brief in Support of its Motion to Affirm the Judgment of the United States District Court, Western District of Oklahoma, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

I. DECISION FOR REVIEW

The judgments of the United States District Court, Western District of Oklahoma, entered on September 9, 1965, in two causes consolidated by orders of that Court on October 5, 1965, in which judgments the Court declared valid orders of the Interstate Commerce Commission issued in its Docket No. MC 43038 (Sub No. 404), Commercial Carriers, Inc. — Petition for Modification of Existing Certificates, and its Docket No. MC 30837 (Sub No. 185), Kenosha Auto Transports, Inc. Petition for Modification of Existing Certificates, and here sought to be reviewed by Appellants, are appended to Appellants' Jurisdictional Statement identified as A-1 and A-2. Intervening Appellee will direct itself to the judgment involving its particular interests, namely Commercial Carriers, Inc., such judgment being set forth as Appendix A-1 in Appellants' Jurisdictional Statement.

II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such judgment is acknowledged by this Intervening Appellee.

III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 U.S.C.A. 301 (307).
2. The Administrative Procedure Act, 5 U.S.C.A. 1001.

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions on which the decision of this cause depends, such questions being outlined on page 5 of the Appellants' Jurisdictional Statement, are so unsub-

stantial as not to need further argument considering the prior decisions of this Court in *The Motor Convoy, Inc. v. United States,* 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436 and *Convoy Company v. United States,* U.S.D.C., Ore., Civil No. 65-241, affirmed *per curiam* — U. S. —, entered January 17, 1966. This Intervening Appellee says: "Yes!"

2. Whether the judgment of the United States District Court, Western District of Oklahoma refusing to set aside an order of the Interstate Commerce Commission in Docket No. MC 43038 (Sub 404) was reversible error. This Intervening Appellee says: "No!"

V. STATEMENT OF THE CASE

The judgment of the United States District Court, Western District of Oklahoma, entered on September 9, 1965, dismissed a complaint brought to set aside orders of the Interstate Commerce Commission entered in its Docket No. MC 43038 (Sub 404), Commercial Carriers, Inc., Petition for Modification of Existing Certificate. The Commission's orders granted the petition of Intervening Appellee for modification of its present common carrier certificate to authorize the inclusion of secondary movements of new automobiles in truckaway service from Irving and Floydada, Texas to points in Texas, but restricted "to traffic originating at the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Michigan and having an immediately prior movement by rail".

The District Court in sustaining the Commission's orders, indicated that in *Motor Convoy, Inc. v. United States, supra*, the Supreme Court had sanctioned the procedure by which the Commission could authorize the modification of "initial movements" of former traffic shipped part way by rail from the factory site, such procedure being in accord with *National Automobile Transporters Association —Declaratory Order*, 91 M.C.C. 395 (hereafter referred to as *NATA*).

VI. ARGUMENT

The Motor Convoy and Convoy Company Cases Are Determinative of the Issues Raised By the Appellants

1. THE MOTOR CONVOY CASE

The questions presented for review in the instant proceeding have all been considered by the Court in *The Motor Convoy, Inc. v. United States, supra,* wherein under facts almost identical to those in the instant proceeding, this Court gave its approval to the procedure for modification of certificates set down by the Interstate Commerce Commission in *National Automobile Transporters Association —Declaratory Order, supra.* In order to define the determinative effects of the *Motor Convoy* case, a brief discussion of the *NATA* decision would perhaps be helpful.

As a result of a petition filed with the Commission on June 27, 1960, by National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to co-ordinate their services with rail carriers in trailer-on-flatcar or multi-level car service. Upon receipt of the petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the petition, received pleadings and briefs from interested parties, held a hearing for the receipt of testimony and documentary evidence,[1] issued a tentative report, accepted further responsive pleadings, and ultimately is-

1. In that proceeding, the president of United Transports, Inc. appeared in support of the petition as president of the NATA and also as president of United Transports, Inc.

sued its Report and Order in MC-C-3024 entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395. Judicial review of the latter decision has never been sought by any party, including United Transports, Inc., Appellant herein.

In the *NATA* case, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus without modification of such operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification, many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and MLRC[2], that this would have disastrous economic effects, and that it was in the public interest and the National Transportation Policy to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic, that it had lost the traffic because of rail intervention and that the traffic was still available for movement by the applicant in the event of such modification.

The procedure which led to the eventual modification of the Intervening Appellee's authority was in exact conformity with the dictates of the *NATA* case. The *Motor Convoy* case arose in precisely the same context and the Commission there granted the applicant's petition for a

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2. Trailer-on-Flatcar service ("TOFC") and multi-level rail car service ("MLRC").

modification of its certificate in order to permit it to continue to perform the remaining motor portion of its former automobile traffic which it had lost as a result of the shift to MLRC service. The Commission's denial of a request for oral hearing and its grant of the requested modification were sustained by the District Court against essentially the same arguments raised by Appellants herein, and that decision was subsequently affirmed by this Court.

Appellants contend that the limited modification authorized by the Commission is equivalent and should be treated as an application for new authority, thus requiring proof of public need and necessity. The District Court in *Motor Convoy, Inc. et al. v. U. S. et al.*, 235 F. Supp. 250 at 253, met an identical argument squarely and stated: "The need for transportation by [petitioner] had previously been established and [petitioner] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." The District Court further found that where the existing carriers such as Appellants herein are concerned, they "would not be affected by the situation" (ibid), since no new service in competition with such carriers is authorized by the modification.

The Appellants indicate that the definitions of "initial" and "secondary" movements historically illustrate that these are two separate and distinct authorities. It is precisely with regard to the problems caused by the phraseology employed in *Administrative Ruling No. 75*, the distinct delineation between "initial" and "secondary" authority and the eventual loss of revenues by "initial" authority carriers as a result of the shift to MLRC service that the Commission issued its order in *NATA*. As noted above, *Motor Convoy*, by sanctioning the *NATA* proce-

dure, explicitly forecloses the contention that the modification is a grant of new authority. It is upon this erroneous contention that Appellants base their argument that the dictates of the Administrative Procedure Act with regard to the granting of a hearing and making of adequate findings have not been met. This contention is untenable in that *Motor Convoy* has conclusively established that the *NATA* procedures are valid.

The District Court in its opinion dismissing the complaint of the Appellant, United Transports, Inc., disposed of the procedural issues as follows:

> "It is clear, therefore, that the procedure followed by the Commission in authorizing the modification of the 'initial movements' certificate of Commercial Carriers, Inc. to include 'secondary movements' of its former traffic shipped part by rail from the factory site, has the sanction of the United States Supreme Court and is not open to question here. To the extent that plaintiffs rest their complaint on the failure of the Commission to afford an oral hearing and to find public necessity for additional service, it is without merit." *United Transports, Inc. v. United States*, 245 F. Supp. 561, 565.

The District Court went on to indicate that if United Transports, Inc. (Plaintiff therein and Appellant herein) were to prevail, it must be because the facts before the Commission did not warrant the action taken or because relevant testimony should have been considered but was not. The opinion noted that the Commission had indeed considered all the evidence of record and that there was no showing by United Transports, Inc., in its demand for oral hearing, what it proposed to develop thereby in the way of relevant testimony. The District Court specifically found that Appellant's (United Transports, Inc.) sec-

ondary authority and any financial hardship imposed on it by the granting of the modification were not determinative facts. *United Transports, Inc. v. United States, supra,* p. 565.

In their Jurisdictional Statement, the Appellants emphasize the "monumental gravity of simple requirements of the law governing procedure" (J. S. 10), and urge this Court to define the "procedure which the Commission may use and adopt in such matters in conformity with the statutory requirements of the Administrative Procedure Act and the constitutional requirement of due process" (J. S. 15). It is submitted that this Court did exactly that in the *Motor Convoy* decision. The instant case certainly does not differ substantially from the *Motor Convoy* case, which the Appellants do acknowledge but fail to adequately distinguish. Invocation of the broad concepts of due process in the Fifth Amendment of the Constitution and violations of the dictates of the Administrative Procedure Act are not distinguishing arguments which would compel a different result herein. If an oral hearing were granted, if the evidence proposed to be entered by the Appellants was indeed received and if the Commission minutely set forth with great detail the basis upon which the Commission reached its decision to modify the Intervening Appellee's certificate, the result would be the same. The Commission, according to *NATA,* would not have even considered Appellant's (United Transports, Inc.) evidence as to its secondary authority and proposed loss of investment. Thus, the Appellants' contention that the District Court in the *Motor Convoy* case did not consider or decide the effect of the Administrative Procedure Act and its provisions regarding oral hearings is totally inappropriate be-

cause an oral hearing would produce no further evidence which would change the basic criteria for modification of certificates in accordance with the NATA procedure.

The fallacy in Appellants' argument lies in its contention that the modification procedure is a grant of new authority. The *Motor Convoy* case specifically found that the modification of certificates was not a grant of new authority. Accordingly, none of the bases which determine the granting of a Certificate of Public Convenience and Necessity are applicable here.

2. THE CONVOY COMPANY CASE

The *Convoy Company* case involved an almost identical set of circumstances. In that case, Commercial Carriers, Inc., Intervening Appellee herein, filed a petition for modification of its present common carrier certificate, No. MC 43038 (Sub 415) in accordance with the procedures set forth in the *NATA* decision. The Commission granted the petition for modification so that Commercial Carriers was authorized to continue to transport Chrysler Corporation traffic it had previously handled in through truckaway service from Detroit, Michigan to points in Oregon, by means of truckaway service, ex-rail, from Portland, Oregon to points in Oregon.

The United States District Court, District of Oregon, dismissed a complaint brought to set aside the orders of the Interstate Commerce Commission, finding that "the orders of the Commission . . . are supported by substantial evidence and are not arbitrary or capricious" (*Convoy Company v. United States*, U.S.D.C., Ore., Civil No. 65-241), and that the decision in *Motor Convoy, supra* "is persuasive" (ibid). On January 17, 1966, this Court affirmed *per curiam* the judgment of the District Court.

It would be unduly repetitious to present in detail the factual circumstances surrounding the *Convoy Company* case. It is sufficient to note that Commercial Carriers filed its petition for modification pursuant to the *NATA* decision in order to enable Commercial to continue to participate in the remaining motor movement of its own former traffic. The facts in *Convoy Company, Motor Convoy* and the instant proceeding are essentially identical. The arguments made by Convoy Company[3] also parallel those proposed by the Appellants herein and can be summarized as follows: (1) that the modification was actually a grant of new authority without proof of public need and necessity, (2) that a hearing should have been held to submit such proof of public need and necessity, (3) that the *NATA* decision was only tentative, and (4) that the Fifth Amendment and The Administrative Procedure Act were violated by the Commission's failure to afford a hearing and to issue complete findings supporting its decision. A comparison of these arguments with those propounded by the Appellants (J. S. p. 5) decidedly shows that the argumentative theory of Appellants is the same as that of Convoy Company in *Convoy Company v. United States, supra*, wherein this Court affirmed a District Court opinion which established that *Motor Convoy* was "persuasive". *Convoy Company v. United States, supra.* The *Convoy Company* case, thus, completely emasculates Appellants' contention that *Motor Convoy* did not consider the effects of the Administrative Procedure Act and the Fifth Amendment of the United States Constitution. The conclusion is that, if the *Motor Convoy* case is not completely determinative of the issues herein, the *Convoy Company* case, taken in conjunction with *Motor Convoy*, most certainly is.

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3. See Jurisdictional Statement filed by Convoy Company in *Convoy Company v. United States and Interstate Commerce Commission*, No. 719, October Term, 1965.

The Commission Acted Within its Discretion in Granting Commercial Carriers' Petition for Modification Without an Oral Hearing

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria by which to determine whether an applicant for operating authority has met the statutory requirements of Part II of the Interstate Commerce Act, Section 207 (a), 49 U.S.C.A. 307 (a). *United States v. Pierce Auto Freight Lines,* 327 U. S. 515 (1946); *Interstate Commerce Commission v. Parker,* 326 U. S. 60 (1945). The requirements for the issuance of a Certificate of Public Convenience and Necessity are vitally different than the grant of the type of modification here in issue, and it is again emphasized that the *petitions* herein were not *applications* for new authority. *Motor Convoy, Inc. v. United States, supra; Convoy Company v. United States, supra.* Nevertheless, the Commission has the discretion to determine the necessary procedures in the administration of all of the provisions of the Act. The Commission's discretionary latitude with regard to procedural criteria in the issuance of Certificates of Public Convenience and Necessity certainly applies to the exercise of such discretion with regard to the modification of certificates. It is not to be concluded that the criteria for modification of certificates be necessarily the same as those for issuance of new certificates. *NATA* decided that in the unique situation involved therein, the procedural criteria would indeed be different and would conform to the factual posture of that case.

Disregarding the compelling effect of *Motor Convoy* and *Convoy Company* and the conclusion that an oral hearing is not necessary, what effect does the Administrative Procedure Act have on the actual failure of the Commis-

sion to hold a hearing? Nothing in the Act requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). As noted by the District Court, there is no factual dispute with regard to the facts the Commission considered; therefore, a hearing would not have produced any further relevant evidence.

Appellants also argue that the Commission failed to state the reasons and basis for its order and failed to make findings of fact in support of its conclusions. By its reference to the *NATA* case and the Commission's determination therein of the remedy which should be afforded the automobile haulers, the Commission made entirely clear the policies upon which its determination of Commercial Carriers' petition for modification would be based. Since the relevant facts as set forth in the verified statement in Commercial Carriers' petition were uncontroverted, the facts upon which the Commission based its final conclusion were unmistakably clear. The findings in the *NATA* decision are, in essence, the "record" upon which the instant proceedings were decided. This Court has found that it is sufficient on judicial review if the findings of the Commission, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States*, 340 U. S. 216. The findings of the Commission did precisely that.

Appellants Are Actually Requesting This Court to Directly Reverse its Decision in Motor Convoy Without Distinguishing it, and to Determine Collaterally That the Procedure Set Forth in NATA is Violative of the Administrative Procedure Act (5 U. S. 1001, et seq.) and the Due Process Clause of the Fifth Amendment of the Constitution

United Transports, Inc. appeared as a party in the *NATA* proceedings and entered its support for the petition filed by National Automobile Transporters Association. As indicated, judicial review has never been sought by the Appellant, United Transports, Inc., in that proceeding, nor by any other party. Although the instant litigation is a distinct and different proceeding basically involving the same issues, United Transports is attempting to attack collaterally the procedures it supported in *NATA*. It is submitted that as a party to the *NATA* litigation, it had ample opportunity to institute judicial review of that proceeding were it to deem the results therein unsatisfactory. In the interim, that *NATA* procedure has been sanctioned by this Court. United Transports has effectively waived any objections it may have had or now has to that procedure.

In *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, at pages 36 and 37, this Court stated:

> "We have recognized in more than a few decisions and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the Courts . . . Simple fairness to those who are engaged in the tasks of administration, and to the litigants, requires as a general rule that Courts should

not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

VII. CONCLUSION

This appeal presents no substantial issues that have not been considered by this Court in the *Motor Convoy* case and the *Convoy Company* case. Plenary consideration is not warranted, and for the reasons indicated, this Intervening Appellee, Commercial Carriers, Inc., respectfully prays that its Motion to Affirm the judgment of the District Court be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald W. Smith, attorney for Commercial Carriers, Inc., Intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, I served copies of the foregoing Motion to Affirm and Brief in Support of Motion upon all parties of record in this proceeding by first class air mail, postage prepaid.

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No. 868.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, and AUTO CONVOY CO.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORTS, INC.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

REPLY TO MOTIONS TO AFFIRM.

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REPLY TO MOTIONS TO AFFIRM.

The Motions to Affirm are premised entirely upon one glaring fallacy, to-wit: that the issues presented in this case have been disposed of by this Court in **Motor Convoy, Inc. v. United States,** 235 F. Supp. 250, affirmed 381 U. S. 436. The Motions to Affirm elaborate upon this initial fallacy by a discussion of the merits of the case as it was before the Commission.

To highlight the nature of this fallacy, we point out that

The appellants (plaintiffs below) have limited this appeal to two basic issues;

(a) Did the Commission comply with the Administrative Procedure Act, 5 U. S. C., § 1001, et seq., by refusing to grant the appellants a hearing with the right to cross-examination?

(b) Did the Commission comply with the Administrative Procedure Act thereof by refusing to state the reasons, basis and fact findings supporting the ultimate conclusion that public convenience and necessity required the granting of the certificates sought by Kenosha Auto Transport and Commercial Carriers in the subject cases?

The **Motor Convoy Case**, supra, is similar to the present case **only** in that it too involved an application to transport automobiles and was purportedly an application encouraged by the so-called **N. A. T. A. Case**, 91 M. C. C. 395.*

But the **Motor Company** decision, affirmed per curiam by this Court, makes no reference to the Administrative Procedure Act or the Commission's obligations under that Act. Instead, the Georgia Court in **Motor Convoy** addressed itself solely to the substantive regulatory facts involved and held, in a decision expressly limited to the particular facts of that case, that the Commission's action in that case was sustainable.

The appellants here assert fundamentally that whatever the Commission has done on the merits cannot be properly reviewed at this time, and is not relevant, because of the Commission's failure to comply with procedural requirements imposed by the Administrative Procedure Act. This argument has been brutally ignored by the Commission; by the respondents; by the majority of the lower court. Only the dissenter below, Judge Bohanon, has addresssed himelf to the only issue we raise.

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* National Automobile Transporter Assn. Petition for Declaratory Order, 91 M. C. C. 395.

THE LOWER COURT'S DECISION CANNOT BE PERMITTED TO STAND AS AN AUTHORITIVE INTERPRETATION OF THE INTERSTATE COMMERCE ACT.

The majority of the three-judge district court, assumed in its opinion that the Kenosha and Commercial Carriers applications were not applications for certificates of public convenience and necessity requiring proof thereof under § 207 (a) of Part II of the Interstate Commerce Act, but were "petitions for modification" of existing authority held by Kenosha and Commercial.

While the title of the application was "Petition for Modification," even the Commission was careful to point out in the **N. A. T. A.** case that the "petitions" would be treated as applications under § 207 (a). See **N. A. T. A.**, 91 M. C. C. 395, 415 (?). These so-called "petitions" resulted in the granting of new authority never before held by Kenosha and Commercial Carriers. The dissenter below, Judge Bohanon, exploded this myth which lies at the bottom of the extremely dangerous opinion of the majority of the lower court.

The real danger and gross legal error which stems from this fallacy is that because of the label "Petition for Modification" the lower court appears to assume that proof of public convenience and necessity is dispensed with in this type of application proceeding. To appellant's great surprise, counsel for the Commission in the lower court, even asserted that the applicants did not have to prove public convenience and necessity.

Even counsel for Kenosha in his Motion to Affirm continues this error when he complains (p. 2, Motion to Affirm of Kenosha Auto Transport) that we, the appellants, would have Kenosha prove its case in this proceeding when Kenosha's existing authority was proven, with re-

spect to public need, "years ago"; a direct assertion that proof of public convenience and necessity proven "years ago" is adequate to sustain a grant of authority now.

We challenge opposing counsel, the Commission and the United States to find one shred of authority that an application filed under § 207 (a) of Part II of the Interstate Commerce Act (which there are according to the Commission) can be granted based upon proof adduced "years ago" in a separate proceeding under entirely distinct economic circumstances.

We further challenge the opposition to find in **Motor Convoy,** supra, or this Court's per curiam affirmance thereof, one hint that proof adduced "years ago" can support the grant of a certificate of public convenience and necessity today. The Georgia Court in **Motor Convoy,** and presumably this Court, did not even address themselves to this question.

The unfortunate and unintended (we believe) result of **Motor Convoy's** affirmance has been to lead the lower courts in the errors referred to herein. Win, lose or draw, this Court should note probable jurisdiction to straighten out a legal mess and to decide once and for all whether the Commission is entitled to ignore the Administrative Procedure Act merely because an application for a certificate of public convenience and necessity is labelled, by an ad hoc Commission decision, a "petition for modification."

If the Commission is permitted to continue to believe that it can grant a certificate of public convenience and necessity without current up-to-date proof thereof, the result will be a dismantling of the existing regulatory system, for the sake of administrative expediency, to the detriment of those carriers which invested their fortunes premised upon that system.

CONCLUSION AND PRAYER.

Wherefore, these Appellants respectfully pray that this Court note jurisdiction, require the matter to be heard upon briefs and argument to the end that judicial certainty may supplant administrative expediency.

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